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BRINKER INTERNATIONAL, INC. and BRINKER
RESTAURANT CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARC SMITH; KEN WHELAN;
individually and on behalf of members of the
general public similarly situated, and as
aggrieved employees pursuant to the Private
Attorneys General Act ("PAGA"),

Plaintiffs,

v.

BRINKER INTERNATIONAL, INC., a
Delaware corporation; BRINKER
RESTAURANT CORPORATION, a
Delaware corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No. C 10 0213 VRW

**DEFENDANTS'
MEMORANDUM OF POINTS
AND AUTHORITIES IN
OPPOSITION TO
PLAINTIFFS' MOTION FOR
REMAND; DECLARATION
OF GINGER HUKILL**

Date: May 6, 2010
Time: 10:00 a.m.
Judge: Hon. Vaughn R. Walker
Courtroom: 6

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I. INTRODUCTION

In their motion for remand, Plaintiffs Marc Smith and Ken Whelan attempt to convince this Court that the removal of this action based on diversity jurisdiction was improper because the amount in controversy requirement is not satisfied. Plaintiffs concede that this case satisfies the complete diversity requirement for removal.

Plaintiffs' argument in favor of remand falls far short of the mark. Defendants' detailed calculations of the amount in controversy in this case are based on conservative interpretations of averments in Plaintiffs' own First Amended Complaint. Moreover, those calculations are supported by the Declaration of Ginger Hukill, submitted herewith. Plaintiffs' attempt to disown the averments in their First Amended Complaint and to reject Defendants' reasonable calculations without submitting any evidence to dispute their accuracy, is insufficient to support remand. Because Defendants have established that it is more likely than not that the amount in controversy exceeds the minimum required for diversity jurisdiction, Plaintiffs' motion should be denied.

II. RELEVANT BACKGROUND

A. Plaintiffs' Claims.

Plaintiffs' First Amended Complaint purports to aver eight causes of action: (1) unpaid overtime (Cal. Lab. Code §§ 501, 1198); (2) unpaid meal break premiums (Cal. Lab. Code §§ 226.7, 512(a)); (3) unpaid rest period premiums (Cal. Lab. Code § 226.7); (4) failure to timely pay wages (Cal. Lab. Code § 204); (5) failure to pay wages at termination (Cal. Lab. Code §§ 201-202); (6) non-compliant wage statements (Cal. Lab. Code § 226(a)); (7) failure to keep proper payroll records (Cal. Lab. Code § 1174(d)); and (8) statutory unfair competition (Cal. Bus. & Prof. Code § 17200). All of Plaintiffs' causes of action are premised on the theory that they are misclassified as exempt from state overtime and related laws. (*See* FAC, ¶¶ 21, 23.)

The various items of relief that Plaintiffs seek include compensatory damages, statutory premiums and penalties under the Labor Code, PAGA civil penalties, attorneys' fees and unspecified injunctive relief. (FAC, Prayer for Relief, ¶¶ 5-43.)¹ Plaintiffs have not stated any specific amount of damages in the First Amended Complaint. (*See id.*)

B. Procedural History.

Plaintiffs filed this lawsuit in Contra Costa Superior Court on December 8, 2009, and served it on December 16, 2009. On January 11, 2010, Plaintiffs filed a First Amended Complaint. On January 15, 2010, Defendants timely removed the action pursuant to 28 U.S.C. § 1441(a) and 28 U.S.C. § 1332(a)(1).

Thereafter, on January 27, 2010, Defendants filed a motion to dismiss Plaintiffs' claims pursuant to Rule 12(b)(6), which is currently noticed for hearing on May 6, 2010.

On February 12, 2010, Plaintiffs filed their motion to remand the action to state court, contending that "Defendants have failed to carry their burden of establishing that the amount in controversy with respect to each Plaintiff is greater than \$75,000."

III. STANDARD FOR REMOVAL BASED ON DIVERSITY JURISDICTION

A. Requirements for Federal Jurisdiction Based on Diversity.

Diversity jurisdiction exists under 28 U.S.C. § 1332(a)(1) for cases in which: (1) there is complete diversity between the parties; and (2) the amount in

¹ Plaintiffs have not averred a separate claim for relief under PAGA. Instead, they incorporate PAGA penalties as components of the remedies they seek on each of their Labor Code claims.

1 controversy as to each plaintiff exceeds the sum of \$75,000, exclusive of interest
2 and costs.

3 Defendants' Notice of Removal demonstrates that both of the requirements
4 for removal based on traditional diversity jurisdiction are met. Plaintiffs only
5 dispute whether the second requirement – the amount in controversy requirement –
6 is satisfied. For the reasons set forth below, this case satisfies the amount in
7 controversy requirement and there is therefore no basis for the Court to decline
8 jurisdiction.

9 **B. Standard of Proof.**

10 Where, as here, a plaintiff fails to plead a specific amount of damages
11 in the complaint, the defendant seeking removal “must prove by a preponderance of
12 the evidence that the amount in controversy requirement has been met.” *Abrego v.*
13 *Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006); *and see Lowdermilk v. U.S.*
14 *Bank Nat’l Ass’n*, 479 F.3d 994, 998 (9th Cir. 2007). Under this standard,
15 Defendants only need to show that it is “more likely than not” that the amount in
16 controversy satisfies the federal diversity jurisdiction amount. *Id.*; *and see Sanchez*
17 *v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). As explained
18 below, Defendants have met this burden.

19 Plaintiffs' assertion that the Ninth Circuit applies a “strong presumption
20 against removal” is irrelevant in cases such as this, where Defendants have satisfied
21 their burden of establishing that removal is proper. *See, e.g., Hawkins v. Fed.*
22 *Express Corp.*, No. 1:09-cv-1905 AWI GSA, 2010 U.S. Dist. LEXIS 12944, at *15
23 (E.D. Cal. Feb. 16, 2010) (finding removal proper despite the “strong presumption”
24 against removal, where the defendant submitted declarations establishing diversity
25 jurisdiction); *Weast v. Travelers Cas. and Surety Co.*, 7 F. Supp. 2d 1129, 1134 (D.
26 Nev. 1998) (finding that defendant’s invocation of diversity jurisdiction is justified
27 “[n]otwithstanding the Ninth Circuit’s finding of a strong presumption against
28 removal.”). Indeed, federal courts have an obligation to exercise the jurisdiction

that is conferred upon them. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (“We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.”).

IV. ARGUMENT

A. Defendants Have Shown by a Preponderance of the Evidence – Based on the Averments in Plaintiffs’ First Amended Complaint – that the Amount in Controversy Requirement Is Met.

Plaintiffs criticize Defendants’ calculation of the amount in controversy as “speculative.” (Pl.’s Mot. to Remand at 4:23.) However, the Notice of Removal makes clear that Defendants’ calculations are premised on the allegations in Plaintiffs’ own First Amended Complaint. (*See* Defendants’ Not. of Removal, ¶¶ 6-7 (explaining in detail how Defendants’ calculations are derived from specific averments in the First Amended Complaint).)² *See also Walker v. Motricity Inc.*, 627 F. Supp. 2d 1137, 1142 (N.D. Cal. 2009) (citing *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541-42 (7th Cir. 2006), for the proposition “that evidence a removing party might use to establish jurisdiction includes calculations based on the complaint’s allegations”).

Plaintiffs’ attack on Defendants’ calculations focuses entirely on Defendants’ assumptions regarding the frequency of the violations alleged by Plaintiffs in the First Amended Complaint. Contrary to Plaintiffs’ assertion, Defendants’

² With apologies to the Court and to Plaintiffs, in preparing this Opposition to Plaintiffs’ motion to remand, Defendants discovered an inadvertent error in its calculation of the amount in controversy. The PAGA penalties attributable to Plaintiffs’ Fifth Cause of Action for failure to pay wages at termination (Cal. Lab. Code §§ 201-202) should not be computed based upon all pay periods of Plaintiffs’ employment, as they necessarily only apply upon the termination of Plaintiffs’ employment, and for up to 30 days thereafter. But even deleting entirely the PAGA penalties as to Plaintiffs’ Fifth Cause of Action (\$8,500 as to Plaintiff Smith and \$19,500 as to Plaintiff Whelan), Defendants’ amount in controversy calculation as to each Plaintiff still far exceeds the jurisdictional minimum for federal diversity jurisdiction, even before taking attorneys’ fees into account.

assumptions regarding the frequency of the alleged violations are entirely reasonable based on the allegations in the First Amended Complaint. Specifically:

- Plaintiffs' First Amended Complaint supports the assumption that Plaintiffs are claiming 2.5 hours of overtime for each day worked: Plaintiffs argue that they do not allege that they "daily worked 10.5 hours." (Pl.'s Mot. to Remand at 7:2.) But, Plaintiffs' First Amended Complaint avers that Plaintiffs "regularly and consistently worked over eight (8) hours in a day, twelve (12) hours in a day." (FAC, ¶ 20.) Defendants' estimate of 2.5 hours of overtime per shift (10.5 hours in a day) is a reasonable and conservative interpretation of Plaintiffs' claims. (*See also* Declaration of Ginger Hukill submitted herewith, ¶ 4.)
- The nature of Plaintiffs' lawsuit – a misclassification case – supports the assumption that Plaintiffs are claiming meal and rest period penalties for each day that they worked: Plaintiffs argue that they do not allege that they "daily missed their rest and meal breaks." (Pl.'s Mot. to Remand at 6:3-7:1.) Plaintiffs have apparently forgotten that the crux of their lawsuit is the claim that they were misclassified as exempt from overtime, meal periods and rest periods. Indeed, the First Amended Complaint avers that Defendants' "salaried Assistant Managers" were misclassified as "exempt" and that Defendants "failed to provide Plaintiffs and the other class members the required rest and meal periods during the relevant time period." (FAC, ¶¶ 23-24.) Given that this is a misclassification case, Defendants' assumptions underlying its calculations are more than reasonable.

Plaintiffs' transparent attempts to ignore the implications of their own averments are unavailing. As vague, conclusory and formulaic as they may be, the statements in the First Amended Complaint regarding the many hours that Plaintiffs

1 allegedly worked, and the meal and rest breaks that they allegedly missed, easily
2 justify Defendants' reasonable – indeed, conservative – calculations.³

3 Defendants' calculations are further justified by the attached declaration of
4 Ginger Hukill, which the Court may properly consider in deciding Plaintiffs'
5 motion to remand. *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840, n.1 (9th Cir.
6 2002) (holding that a district court may treat an opposition brief as an amendment
7 to the notice of removal); *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 949
8 (11th Cir. 2000) (holding that a district court may consider post-removal evidence
9 in determining whether the jurisdictional amount was satisfied at the time of
10 removal); *Alvarez v. Ltd. Express, Inc.* No. 07CV1051 IEG (NLS), 2007 U.S. Dist.
11 LEXIS 58148, at *6 (S.D. Cal. Aug. 8, 2007) (“[i]n addition to the contents of the
12 removal petition,” the court may also consider “summary-judgment-type evidence
13 relevant to the amount in controversy at the time of removal.”); *and see Ellenburg*
14 *v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 200 (4th Cir. 2008) (only when
15 jurisdictional allegations are challenged must the proponent of federal jurisdiction
16 demonstrate that removal is proper).

17 Contrary to what Plaintiffs would have this Court believe, Defendants do not
18 need to prove the precise amount in controversy and their good faith estimate of the
19 amount in controversy will suffice to establish diversity jurisdiction. *See Oshana v.*
20 *Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (In situations where “the
21 plaintiff, the master of the complaint, does not want to be in federal court and
22 provides little information about the value of her claims . . . a good-faith estimate of
23 the stakes is acceptable if it is plausible and supported by a preponderance of the

24 ³ Moreover, Plaintiffs' counsels' assertion that they have “no evidence on
25 which to categorically deny Defendants' damages estimates” is without basis.
26 (Pl.'s Mot. to Remand at 5:25-27.) Certainly, Plaintiffs themselves are aware of
27 approximately how much overtime they worked and how frequently they believe
28 they were denied meal and rest periods. The fact that Plaintiffs have not submitted
any evidence to dispute Defendants' estimates is telling.

evidence.”); *Hawkins v. KPMG LLP*, 423 F. Supp. 2d 1038, 1047 (N.D. Cal. 2006) (“in evaluating jurisdiction in a diversity suit, a court may determine that the amount in controversy more likely than not exceeds \$75,000 without reaching a conclusion as to the precise amount of damages.”). Defendants have certainly met their burden of proving that it is more likely than not that the \$75,000 amount in controversy requirement has been met with respect to each of the plaintiffs in this case.

B. The Amount in Controversy Requirement Is Satisfied Even if 75% of the PAGA Penalties Are Subtracted.

Plaintiffs argue that Defendants’ calculation of the amounts in controversy are “inflated” because they include all of the Private Attorneys’ General Act (“PAGA”) penalties, instead of only the 25% that would be payable to Plaintiffs. (Pl.’s Mot. to Remand at 7:28-8:1.) This argument is unavailing because even if the 75% of potential PAGA penalties that are payable to the State are deducted from Defendants’ calculations, the amount in controversy as to each of the Plaintiffs still exceeds \$75,000.

Specifically, Defendants’ Notice of Removal demonstrates that a reasonable estimate of the amount in controversy with respect to Plaintiff Smith’s claims is \$122,721.85.⁴ The portion of that figure that is attributable to PAGA penalties is \$51,000. If 75% of those PAGA penalties (the amount that would be payable to the State) is deducted from the total amount in controversy, the remaining amount in controversy with respect to Smith’s claims is \$84,471.85, which is still substantially more than the \$75,000 minimum.

The same is true for Plaintiff Whelan. As set forth in the Notice of Removal, a reasonable estimate of the amount in controversy with respect to Whelan’s claims

⁴ This number does not include the \$8,500 mistakenly attributed to PAGA penalties for the Fifth Cause of Action, as discussed in footnote 2, above.

1 is \$264,748.35.⁵ The portion of that figure that is attributable to PAGA penalties is
 2 \$117,000. If 75% of those PAGA penalties (the amount that would be payable to
 3 the State) is deducted from the total amount in controversy, the remaining amount
 4 in controversy with respect to Whelan's claims is \$176,998.35 – far more than
 5 double the \$75,000 minimum.

6 Therefore, even after deducting 75% of the potential PAGA penalties that are
 7 at issue, the claims of both Plaintiffs clearly satisfy the amount in controversy
 8 requirement and there is no basis for remand.

9 **V. CONCLUSION**

10 Defendants have demonstrated by a preponderance of the evidence that the
 11 amount in controversy as to each of the Plaintiffs exceeds \$75,000. For all the
 12 foregoing reasons, Plaintiffs' motion to remand this action to state court should be
 13 denied.

14 Dated: April 15, 2010

Respectfully submitted,

15 KAREN J. KUBIN
 16 SAMANTHA P. GOODMAN
 MORRISON & FOERSTER LLP

17
 18 By:  _____
 19 Karen J. Kubin

20 Attorneys for Defendants BRINKER
 21 INTERNATIONAL, INC. and BRINKER
 22 RESTAURANT CORPORATION
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 24
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 26

27 ⁵ This number does not include the \$19,500 mistakenly attributed to PAGA
 28 penalties for the Fifth Cause of Action, as discussed in footnote 2, above.

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DECLARATION OF GINGER HUKILL

I, Ginger Hukill, declare:

1. I am employed by Brinker International Payroll Company, L.P. (“Brinker”) in the capacity of Director HR Compliance. I have been employed in this capacity since September 30, 2004. Brinker is the entity that employs all persons who work at Chili’s restaurants. As Brinker’s Director HR Compliance, I am responsible for ensuring compliance with Federal and State laws, Brinker policies and procedures, and special projects between Chili’s restaurants and our Corporate Office. I act as a liaison between Legal, Payroll, PeopleWorks and various other departments with respect to Chili’s restaurant employees.

2. Attached hereto as Exhibit A is a true and correct copy of the New Hire Data Sheet for Plaintiff Terry “Marc” Smith, which reflects that his starting salary as a Manager at Chili’s was \$50,000.00 annually. This New Hire Data Sheet was prepared in the regular course of business by Brinker at the time of Mr. Smith’s hire and is maintained in the Brinker corporate office recruiting department files.

3. Attached hereto as Exhibit B is a true and correct copy of the New Hire Data Sheet for Plaintiff Ken Whelan, which reflects that his starting salary as a Manager at Chili’s was \$50,000.00 annually. This New Hire Data Sheet was prepared in the regular course of business by Brinker at the time of Mr. Whelan’s hire and is maintained in the Brinker corporate office recruiting department files.

4. Chili’s Managers are paid biweekly, on a salary basis. Managers are generally scheduled to work 10-11 hours per day, or 50-55 hours each week.

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Exhibit A

Shared Services New Hire Data Sheet

Brand	Chili's		PW Manager/ Recruiter	Jennifer Kufahl		Date	06/11/07	
Type of Hire	New Hire				EE ID # (PWFR Use Only):			
Legal Name First / Middle / Last	Terry Smith				Preferred Name First / Last			
Social Security #	REDACTED				Start Date	06/20/07		
Birthdate	05/24/49				Transfer Date (MGO Only)			
Highest Level of Education	HS Grad				Degree/ Major Code	None		
Gender	Male	Marital Status	Married		Temp Housing Req? If yes, complete Temp Housing Tab			
Street Address (include Apt # - NO PO BOXES for Overnight Delivery)	866 S. Rancho Sante #C				City, State Zip	San Marcos, CA 92078		
Email Address	tmpoppop@yahoo.com				Phone	760-685-2644		
Ethnicity	White							
Most Recent Job Experience	Retail				Years Experience	4 Hourly	14 Manager	
					Uniform/ Shirt Size	Medium	Serv Safe Certified?	No
Source Type/ID	Internet - 4				Specific Source	Give complete info: full web address, name of publication, name & store of EE who referred applicant, store name & # promoted from. monster.com		
Training Store #	701-Scripps Gateway				Job Out of Training	Manager	Other Job?	
Final Store # (MGO Only)					Out of Training Date	09/20/07		
Starting Rates	\$50,000 Annual	\$1,923.08 Biweekly	\$17.48 Hourly					
PWFR Only	MIT PG	OOT PG	Job Code					
Eric Quillin Orientation Facilitator/Title	9am Time	269 Store #	Escondido Orientation Store Name	Orientation Store Deliver Materials Where?				
Notes/Comments								

Exhibit B

Recruiter New Hire Data Sheet

Concept	Chili's Grill & Bar		Recruiter	Ric Edgar		Date	4/13/10					
Type of Hire (please circle/highlight one)	<input checked="" type="radio"/> New Hire	<input type="radio"/> Rehire	<input type="radio"/> Promo from Hourly	<input type="radio"/> Transfer from HO/Other Concept								
Social Security #	REDACTED			Start Date MM/DD/YY	05/16/06							
Legal Name First/Middle/Last	Kenneth Whelan											
Marital Status (circle/highlight one)	<input checked="" type="radio"/> Married	<input type="radio"/> Single	<input type="radio"/> Unknown	Preferred First/Last Name	Ken Whelan							
Street Address (Include Apt #)	4205 Merced Circle											
City, State, Zip	Antioch, CA 94531											
Phone (Area Code Required)	309-299-1973			Gender (please circle/highlight one)	<input checked="" type="radio"/> Male	<input type="radio"/> Female						
Highest Education Level (please circle/highlight one)	Less Than HS Grad	HS Grad	< 1Yr College	Degree (please circle/highlight one)	Hotel/Rest Mgmt	Culinary	Business					
	1+ Yrs College	2 Yr Degree	Culinary w/Degree		Liberal Arts	Social Sciences	Math/Hard Sciences					
	4 Yr Degree	Some Grad	Master's		Other Degree	None	Unknown					
	Doctorate	Unknown										
Source Type (please circle/highlight one)	Internal Promo	Rehire	<input checked="" type="radio"/> Internet	Specific Source	www.monster.com							
	Ad	Employee Referral	Agency	Give complete info: full web address, name of publication or name & store of Employee who referred applicant								
	College Recruiting	Walk-In	Career Fair									
	Open House	Transfer In	Unknown									
Birth Date MM/DD/YY	07/07/72			Ethnic Code (please circle/highlight one)	American Indian	Asian	Hispanic					
					Black	White	Unknown					
Most Recent Job Experience (please circle/highlight one)	Quick Service	Full Family	Contract	Years Experience	<table border="1"> <tr> <td></td> <td>5</td> </tr> <tr> <td>Hourly</td> <td>Manager</td> </tr> </table>					5	Hourly	Manager
	5											
Hourly	Manager											
	Retail	Fine Dining	Limited/Cafeteria									
	Full Casual	Other										
Training Store #	#507 Reno			Job Out Of Training (please circle MGR or give other title)	MGR or	Other Job?						
Starting Rates	\$ 50,000 Annual	17.48 Hourly		Out of Training Date MM/DD/YY	8/8/2006							
				Shirt Size	XXXL	(Chili's Only)						
				Serv Safe	N	(Chili's Only)						
John Shiner				Orientation Time				Reno #507				
Orientation Area Director				Orientation Store Name/#								